

I. CONSCRIPTION OF MEN FOR THE ARMED FORCES

In fundamental outline, conscription of manpower has changed little since 1917.¹ The basic features remain universal liability for military service of the male population of designated ages and the selection, by an administrative system which relies chiefly on the discretion of local boards, of those most fit for training and service and most easily spared from the nation's productive effort. The choice of this method in preference to a system of calling all men within certain age classes or of encouraging extensive voluntary service seems wise in view of the efficiency of selective service in the last war and the opportunities, not present in alternative schemes, to control its effect upon business and civilian life.

Any challenge to the legislation as a whole on constitutional grounds would be met by the *Selective Draft Cases*,² which held that the war power³ is not limited by the militia clause,⁴ and that possible limitations on the power by the Fifth and Thirteenth Amendments do not preclude compulsory military service. Although the influence of the war may have caused the Court in these cases to brush aside rather than answer some objections,⁵ there is no indication that this authority would not be followed.

Since the needs of preparation are as vital as those of actual war, there would be little reason for applying to the present legislation different tests of constitutionality and social desirability merely because it is the first instance of a military draft in time of peace. Indeed, the recent prevalence of undeclared wars and the present equivocal international position of the United States suggest that the line between "war" and "peace" has become indistinct.

The one new feature of the Act, designed to prevent the economic dislocation of drafted men by providing for their reemployment, indicates that Congress has looked beyond the immediate problem of raising men. And the purpose of this discussion—based on the assumption that the Act will

1. Compare Pub. L. No. 783, 76th Cong., 3d Sess. (Sept. 16, 1940) (hereinafter cited by section only) with the Selective Service Act of 1917, 40 STAT. 76 (1917). Comparison of the army's plans for wartime conscription as of 1936 with the present Act strikingly illustrates differences between provisions essential for purely military purposes and those attempting to fit the draft into normal civil life. See SEN. REP. No. 944, 74th Cong., 2d Sess. (1936), part 4, p. 69 *et seq.*

2. 245 U. S. 366 (1918).

3. U. S. CONST. Art. 1, § 8 provides that Congress shall have the power: "To declare War . . . to raise and support Armies, . . . to make Rules for the Government and Regulation of the land and naval Forces; . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."

4. *Ibid.* ". . . to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; . . ." Section 3(e) of the present Act limits the service of those inducted into the land forces to the Western Hemisphere or United States possessions.

5. See Black, *The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism* (1931) 11 B. U. L. REV. 37.

successfully mobilize the nation's manpower for direct military service—is to indicate possible impacts of this legislation, political and economic, on the rights of the individual and his present pattern of life, and to consider possible future tendencies in the event of a swing toward or away from war.

A. THE POLITICAL IMPACT OF CONSCRIPTION

Registration.—The first and most universal obligation imposed by the Act is registration.⁶ Although the primary purpose of registering and classifying is to select the men most fitted for immediate training, an important consequence is to supply the government with detailed information concerning a large portion of the population.⁷ Reactions as to the desirability of this result may differ,⁸ but it is interesting to note that one of England's early measures in the present war was to institute nation-wide registration, apparently to ascertain in detail the occupations and qualifications of its population.⁹

Selection.—The fundamental administrative units in the selection process are the local boards, exercising broad discretion within the general standards of the Act and the regulations. Determinations of these boards, subject only to review by appeal boards and, in rare instances, by the President, are final on the vital questions of exemptions, or deferments because of dependents or essential occupations.¹⁰ It is therefore exceedingly important that there

6. Section 2. The men who were between the ages of 21 and 35 on Oct. 16, 1940, and so were required to register, will be legally liable to call until Sept. 1945. Those who become 21 within that time will be subject to registration when the President proclaims subsequent registration days. Judging from the experience of the last war, the men actually inducted into the army will be largely from the lower age groups. 2 REP. PROVOST-MARSHALL GEN. (1919) 189.

7. Some information is supplied by the registration cards themselves, and more complete data will be obtained through the questionnaires that follow.

8. Compare the enthusiasm of Provost-Marshal-General Crowder at having an inventory of the nation's manpower, with objections to the tagging and numbering of millions of Americans. 2 REP. PROVOST-MARSHAL-GEN. (1919) 3; *The Burke Wadsworth Conscription Bill* (1940) 9 INT. JURID. ASS'N BULL. No. 2, p. 15.

9. National Registration Act, 1939, 2 and 3 GEO. VI, c. 91. All persons are obliged to register and give such particulars as to name, age, occupation, etc., as the Ministers may prescribe. Each registrant receives an identity card which must be shown on request to constables or other authorized persons. The United States now requires the registration of all aliens. Pub. L. No. 670, 76th Cong., 3d Sess. (June 28, 1940). For a collection of state statutes requiring their registration for informational purposes, see (1939) 53 HARV. L. REV. 149, 150.

10. Section 10(a)(2). A similar provision was given judicial sanction in 1917. *Angelus v. Sullivan*, 246 Fed. 54, 62 (C. C. A. 2d, 1917). For present standards for these deferments, see SELECTIVE SERVICE REGULATIONS (1940) (hereinafter cited as REGULATIONS) §§ 351, 352, 354, 355.

be no striking disparity between the decisions of different boards.¹¹ Consequently the President has been given power to make the "necessary rules and regulations."¹² Within these regulations, uniform administration, of course, depends largely upon the personnel of the local boards;¹³ the persuasive effect of instructions from their superiors in the Selective Service Administration is the only coordinating force other than the appeals system. The regulations relating to appeals are substantially the same as those promulgated in the last war.¹⁴ Registrants dissatisfied with their classification, or those claiming deferred classification in their behalf,¹⁵ may within a limited time appeal as of right to an appeal board¹⁶ and, in special cases, to the President.¹⁷ The Government always has a right of appeal.¹⁸ The appeal boards may make any classification they deem proper.¹⁹

Although the registrant may appear in person before the local board, he has no right to be represented by counsel or to present oral testimony of witnesses.²⁰ The combination of this rather summary procedure and the almost unlimited discretion of the local board on substantive issues makes

11. The American Civil Liberties Union fears that such a disparity may arise in dealing with conscientious objectors. N. Y. Times, Oct. 13, 1940, § 1, p. 7, col. 4. There are indications that in England these fears have been realized. See THE MANCHESTER GUARDIAN WEEKLY, Dec. 29, 1939, p. 519, col. 2.

12. Section 10(a) (1), (2).

13. The successful administration of the World War draft indicates the competency of its local boards. Section 10(a) (2) provides for the same system of civilian members appointed by the President on recommendation of the highest state officials.

14. SELECTIVE SERVICE REGULATIONS (2d ed. 1918).

15. Such as dependents, employers, or unions. See note 20 *infra*.

16. REGULATIONS § 370. No appeal, however, may be made in which the applicant merely seeks to change from one deferred classification to another.

Although the appeal boards will not, of course, exert a nation-wide centralization, they will prevent disparities within limited areas.

17. *Id.* § 379.

18. *Id.* § 371.

19. *Id.* § 374.

20. Sections 367, 368, 369. Although classification may present few traditionally legal problems, assistance of counsel might enable a registrant to present his case more convincingly.

An example of the extent of interests affected by the selection process is its possible influence on labor controversies. Indispensability of individuals must of necessity be determined largely by testimony of their employers, thus giving the latter a strategical advantage. See N. Y. Times, Sept. 26, 1940, p. 8, col. 3; (1940) 7 LAB. REL. REP. 73. The director of Selective Service has suggested that employers list registrants in their employ who do not have dependents, and determine those who cannot be immediately replaced if called for training. Selective Service Release No. 90, Oct. 26, 1940, C. C. H. War Law Serv. ¶ 64521. Those seeking industrial deferment must file affidavits from their employers and immediate superiors. But any interested party, and hence presumably a labor union, may present evidence on their behalf. REGULATIONS § 322. See N. Y. Times, Oct. 11, 1940, p. 11, col. 1. Moreover, the employer's strategical advantage might possibly be offset by the appointment of labor advisers to the appeal boards.

it important that in the appeal boards there be a real opportunity for correcting unfairness. But their review, limited to written evidence in the registrant's file, does not appear adequate where the individual's liberty is so vitally affected.²¹ The absence at the outset of more complete standards for decision and of the common procedural protections is unfortunate, since under the strain of war or intense preparation therefor, public opinion adverse to appeals and the pressure of numbers might handicap efforts to secure uniformity and fairness of administration through the appeals system.

The problem of conscientious objectors contains implications going beyond the single question of administration. As a delicate moral issue, as a breeder of violent controversy and epithets, and as a subterfuge for evasion it offers complexities that only self-restraint and calm judgment can unravel. Both statute and administration in the last war were unsatisfactory in that they exempted only well-established pacifist sects²² and exposed many objectors to unsympathetic army officers.²³ The 1940 Act, which appears to profit from the British experience,²⁴ recognizes any objection based on religious training and belief and provides for some civilian service²⁵ — thus offering at least a broader base for a more successful solution.²⁶ Despite these con-

21. Sections 373, 374.

22. 40 STAT. 78 (1917). Provided there are adequate tests of sincerity, only a philosophy that considers exemptions for conscientious objectors as mere political concessions can justify limiting exemptions to members of established pacifist groups and excluding others who have scruples of conscience. See the statements of representatives of the Quakers and the American Civil Liberties Union in *Hearings before Committee on Military Affairs on S. 4164*, 76th Cong., 3d Sess. (1940) 164, 308-10.

23. For an account of the difficulties in dealing with conscientious objectors in the army and the concessions found necessary, see 2 REP. PROVOST-MARSHAL-GEN. (1919) 60 *et seq.* Some civilian service was eventually allowed. See also *Hearings before Committee on Military Affairs on S. 4164*, 76th Cong., 3d Sess. (1940) 198, 199.

24. The National Service (Armed Forces) Act, 1939, 2 and 3 GEO. VI, c. 81, § 5 provides for a special register of conscientious objectors, hearings before local tribunals to establish sincerity, and division into three classes: (1) those proving absolute objections to any service; (2) those objecting to any military service and receiving civilian service; (3) those objecting to combatant duty. Apparently the proportion of conscientious objectors registering has not been over 3%. See *Hearings before Committee on Military Affairs on S. 4164*, 76th Cong., 3d Sess. (1940) 310.

25. Section 5(g) provides for investigation by the Department of Justice of claims of those who appeal from refusal by local boards to classify them as conscientious objectors "by reason of religious training and belief." Thereafter the Department recommends the disposition of the claim to the appeal boards, where the appellant may be classified for non-combatant or civilian service, depending upon the extent of the objection. These provisions were added to the law after its introduction. See the original bill, S. 4164, 76th Cong., 3d Sess. (1940). The administrative policy appears to be to avoid the issue as much as possible. Appeal boards are to consider any possible grounds for deferment before deciding on the conscientious objection. REGULATIONS §§ 363, 375. The local boards will keep a public register of objectors. REGULATIONS § 366.

26. See Baldwin, *Conscientious Objectors*, THE NATION, October 12, 1940, p. 326.

cessions, those who have objections stemming from non-religious convictions are still unprotected.²⁷

Induction.—The importance of induction into the armed forces is that it marks the transition to military status. Under the Act of 1917 a notice to report for duty subjected its recipient to military law;²⁸ failure to obey, even if the offender had not registered, could lead to court martial for desertion.²⁹ Under the present statute, military law cannot be applied until the person is "actually inducted" into the armed forces,³⁰ which occurs, according to the regulations, when the oath of allegiance is taken at the army induction center.³¹ Men within the registration ages thus escape automatic subjection to the rigors of military law.

Active Service.—The status of the conscript once he is in the armed forces differs radically from his former position in civil life. His constitution and laws are the Articles of War and the Army Regulations. The governing concept is not freedom of individual development but unquestioning obedience to command. In place of the civil courts and a procedure designed to protect liberties of the individual are the courts-martial, where of necessity an authoritarian control exists. Quite apart from the possibility of abuse of this great power, military service will substantially deprive the nation of conscripts' participation in political affairs.³² In connection with the important problem of voting, there may be at least a temporary difficulty until adequate legislation for absentee registration and voting can be secured in states in which it is lacking.³³ Moreover, conscripts may be forbidden to engage in activities which their superiors consider detrimental to military policy. Activities that are undertaken must conform to the requirements of the Articles of War,³⁴ of which the most significant is the indefinite Article 96, permitting punishment of "all disorders and neglects to the prejudice of good order and military discipline . . . and all conduct of a nature to bring discredit upon the military service."³⁵

27. From a statement of the director of Selective Service of New York City, it may be inferred that "religious" in "religious training and belief" will be construed as modifying "belief," as well as "training." See N. Y. Times, Nov. 10, § 1, p. 30, col. 1. Cf. D. S. S. Form 47, C. C. H. War Law Service, ¶ 64523.

28. *Franke v. Murray*, 248 Fed. 865 (C. C. A. 8th, 1918).

29. *Ex parte Dunn*, 250 Fed. 871 (D. Mass. 1918).

30. Section 11.

31. REGULATIONS § 429.

32. On the other hand, military life may exert a democratizing influence.

33. See Steinbicker, *Absentee Voting in the United States* (1938) 32 AM. POL. SCI. REV. 808. New Jersey recently passed such a law. N. Y. Times, Sept. 26, 1940, p. 14, col. 3. There is pressure for one in New York. N. Y. Times, Oct. 7, 1940, p. 12, col. 1.

Only one day's leave of absence to permit voting in person is required. Section 8(h).

34. 10 U. S. C. §§ 1471-1593 (1934), as amended 50 STAT. 724 (1937), 10 U. S. C. §§ 1522, 1542 (Supp. 1939).

35. See Carbaugh, *Pleading and Practice Under the 96th Article of War* (1918) 13 ILL. L. REV. 1.

The system of trial of these offenses by courts-martial³⁶ aroused considerable controversy after the last war.³⁷ Several reforms were instituted, designed to give the accused more of the privileges of the defendant in a criminal trial, and to secure more legal guidance for the court and adequate review on the law.³⁸ Maximum limits were set for sentences in time of peace.³⁹ Despite these reforms, military judges will continue to be influenced by their training and philosophy. And no review in the civil courts is available except on the question whether the court-martial has exceeded the jurisdiction conferred upon it by the Articles of War.⁴⁰

Return to Civilian Life.—On his discharge, if in the judgment of his superiors he merits it, each man will get a certificate of satisfactory service.⁴¹ Since the acquisition of such a certificate is prerequisite to enjoyment of the reemployment provisions of the Act,⁴² great power is vested in commanding officers. The Act places final determination of satisfactory service in the hands of the army—thus any men denied their certificates would

36. Art. 2 subjects to military law "all . . . persons lawfully called, drafted, or ordered into . . . the said service. . . ." By Arts. 12, 13, and 14 the jurisdiction of courts-martial includes the trial of all persons subject to military law for any crime or offense made punishable by the Articles. For offenses also within the jurisdiction of the civil courts, Art. 74 provides that, except in time of war, the commanding officer shall on due application exert himself to the utmost to deliver the offender to the civil authorities. In time of war, the military authorities have priority. *Ex parte King*, 246 Fed. 868 (E. D. Ky. 1917).

37. Compare Ansell, *Military Justice* (1919) 5 CORN. L. Q. 1, with Bogert, *Courts-Martial—Criticism and Proposed Reforms* (1919) 5 CORN. L. Q. 18. See Morgan, *The Existing Court-Martial System and the Ansell Army Articles* (1919) 29 YALE L. J. 52. Although consideration of military discipline may be thought to justify the rather summary procedure of the courts-martial, it may be argued that the procedure prescribed by Articles of War drafted for professional soldiers is ill-adapted for a conscript army in peacetime.

38. Compare 39 STAT. 650 *et seq.* (1916), with 41 STAT. 787 *et seq.* (1920), 10 U. S. C. §§ 1471–1593 (1934), for significant changes in Arts. 4, 8, 17, 18, 21, 31, 32, 38, 40, 43, 46, addition of Art. 50½, and the change in Art. 70. See Note (1921) 21 COL. L. REV. 477. No such reforms have been made in the Articles for the Government of the Navy. See 34 U. S. C. § 1200 (1934). There is little immediate prospect, however, of requiring conscripts to serve in the navy. See N. Y. Times, Sept. 30, 1940, p. 1, col. 2.

39. Arts. 43, 45.

40. *Johnson v. Sayre*, 158 U. S. 109 (1895); *Ex parte Mason*, 105 U. S. 696 (1881); *Dynes v. Hoover*, 20 How. 65 (U. S. 1857). This may occur when a court-martial attempts to assert jurisdiction over a person not subject to military law, or when it attempts to deal with a person subject to its jurisdiction in a manner not authorized by the Articles of War.

One army officer tried for 25 years without success to obtain review of a court-martial. For his latest attempt, see *Carter v. Woodring*, 92 F. (2d) 544 (App. D. C. 1937), *cert. denied*, 302 U. S. 752 (1937).

41. Section 8(a).

42. Section 8(b).

presumably have to exhaust their administrative remedies within the army,⁴³ and could then secure court review only if their superiors had denied them a hearing or decided arbitrarily.⁴⁴

Following the year's training, conscripts are transferred to reserve components of their services for a ten-year period or until they attain the age of forty-five, whichever happens first.⁴⁵ Only a militaristic policy would require their subjection to military law before they were again called to active duty, and the second Article of War appears to assign inactive reservists to a civilian status.⁴⁶ But the power to call out reservists,⁴⁷ once a large group had entered this class, might conceivably under appropriate legislation be used as an indirect but effective way of silencing activities objectionable to the Government or the army. Those who have served their year under the Selective Service Act are liable to be recalled in the discretion of the President under existing or future laws for the calling to active duty of their reserve units.⁴⁸ The National Guard Resolution authorizes the President to call the present reserve components of the army for a year's active training whenever he deems it necessary for strengthening the national defense.⁴⁹ Although this service appears to parallel that required under the Selective Service Act, it is not clear whether conscripts on entering reserve units could be called for another year of duty. It may be too early to insist on exact legislative definition of this subject, but should conscription continue many years, peacetime liability of reservists to active service should be carefully delimited.

43. Cf. *Ex parte Kuswesi*, 251 Fed. 977 (N. D. N. Y. 1918); see Comment (1933) 51 HARV. L. REV. 1251. The only formal administrative remedy would appear to be a complaint under Art. 121 of the Articles of War.

44. Cf. *United States v. Ju Toy*, 198 U. S. 253 (1905); see *Ng Fung Ho v. White*, 259 U. S. 276, 284 (1922). These cases arose in immigration tribunals, which are analogous to the courts-martial in their relation to civil courts.

45. Section 3(c). But liability for reserve service may be avoided by two additional years of active service.

46. This Article subjects to military law "all . . . persons lawfully called, drafted, or ordered into or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same." The implication of this and the acts establishing the reserve units is that the "said service" refers only to active duty. Cf. DIGEST OF OPINIONS OF JUDGE-ADVOCATE GENERAL (Jan.-June 1921) 24. Failure to obey a lawful call is, of course, desertion and within military jurisdiction.

47. Present provisions for calling up reserves generally authorize summoning "members" of the different organizations. See note 49 *infra*. There is apparently no requirement that certain classes or units be called as a group.

48. Section 3(c).

49. National Guard and Reserves Resolution, Pub. Res. No. 96, 76th Cong., 3d Sess. (Aug. 27, 1940) § 1. Previous liability to active service except in time of emergency did not exceed 15 days. 10 U. S. C. §§ 343, 369, 426 (Supp. 1939).

Penal Provisions.—Unlike its predecessor, the 1940 Act forbids anyone knowingly counseling its evasion.⁵⁰ In the last war, convictions for this type of activity⁵¹ had to be sought under the section of the Espionage Act forbidding obstruction of recruiting for, or incitement of insubordination in, the armed forces.⁵² Some of these convictions were of slight credit to a democratic government,⁵³ having as their sole ground the dissemination of socialistic or pacifist propaganda which did not directly urge disobedience to the draft.⁵⁴ And after the war, reexamination of the fundamentals of free speech indicated that the severity arose largely from the judicial use of indefinite tests for causation and intent which placed little restraint upon naturally unsympathetic juries.⁵⁵

50. Section 11 provides that whoever "knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court-martial, and, on conviction, shall suffer such punishment as a court-martial may direct."

51. Section 6 of the 1917 Act prohibited only such conduct as constituted actual or attempted evasion of its requirements. 40 STAT. 81 (1917). Since it did not forbid *counseling* its evasion, action that could not be proved to result in either an attempted or a completed violation could not be punished, though such action might seek to induce disobedience by others. Cf. *United States v. Galleanni*, 245 Fed. 977 (D. Mass. 1917) (counseling evasion of draft not an "offense" under any federal statute before Espionage Act, but erroneously held to be a federal common-law crime); *Hammerschmidt v. United States*, 265 U. S. 182 (1924) (prosecution for same conduct; no offense under draft act alleged). Hence the resort to the Espionage Act.

52. Espionage Act of 1917, § 3, 40 STAT. 219 (1917) as amended, 40 STAT. 533 (1918), 50 U. S. C. § 33 (1934). The Amendment added prohibitions almost as indefinite and sweeping as those of the Sedition Act of 1798. It was repealed at the end of the war. 41 STAT. 1360 (1921). But significantly many doubtful convictions were secured under the apparently limited language of the original act. The 1917 Act is still effective in time of war; should the nation become engaged in war, its provisions may overlap with those of the instant statute.

53. *E.g.*, *Pierce v. United States*, 252 U. S. 239 (1920); *United States v. Rose Pastor Stokes*, U. S. Dept. Justice Bull. No. 106 (W. D. Mo. 1917), *rev'd*, 264 Fed. 18 (C. C. A. 8th, 1920). But cf. *United States v. Baker*, 247 Fed. 124 (D. Md. 1917). See Note (1919) 32 HARV. L. REV. 417.

54. Rose Pastor Stokes wrote a letter to the press stating that she opposed the government because it was for the profiteers, while she was for the people. In 1917 the district court permitted a conviction; in 1920 the circuit court reversed, stressing the necessity for "extraordinary coolness, care and impartiality" to prevent patriotic fervor from usurping the sphere of justice. *Stokes v. United States*, 264 Fed. 18, 25 (C. C. A. 8th, 1920). In *Pierce v. United States*, 252 U. S. 239 (1920) (Holmes and Brandeis dissenting) the conviction was for circulating a Socialist pamphlet, after the defendants had waited until the court in *United States v. Baker*, 247 Fed. 124 (D. Md. 1917), had directed an acquittal for distribution of the same pamphlet.

55. See Chafee, *Freedom of Speech in War Time* (1919) 32 HARV. L. REV. 932. In England official curtailment of individual liberties has been similarly criticized.

The importance of propaganda and civilian morale in modern war may require that the formation of public opinion be more completely controlled than ever before. Evidence of this may be found in the all-inclusive and indefinite prohibitions of the British and Canadian Defense Regulations,⁵⁶ which give free rein to the war-sensitive judicial or administrative bodies. In the present American situation, however, freedom of discussion must still be safeguarded. It is important, therefore, to note statutes susceptible in time of strain to the distortion received by the World War acts. Already both the substance of the sections of the Espionage Acts forbidding interference with the armed forces and a general criminal syndicalism act have been placed in those sections of the Alien Registration Act which have general application.⁵⁷ By and large the penal section of the present draft law parallels the 1917 Act, with the additional requirement throughout of "knowing" violation.⁵⁸ Its prohibitions appear carefully defined and close to the traditional concepts of criminal attempt and conspiracy. However, the added phrase, "who knowingly counsels . . . another to evade . . . any of the requirements of this Act," although narrowed in the process of drafting,⁵⁹ and possibly as free from danger as the other provisions, appears susceptible to that elastic construction for which the Espionage Acts were criticized.

B. THE ECONOMIC IMPACT OF CONSCRIPTION OF MANPOWER

Moratory Provisions.—Concern with the financial problems of the soldier is by no means novel in American legislative experience. Many states,

See *The Dangers of D. O. R. A.*, THE MANCHESTER GUARDIAN WEEKLY, Nov. 3, 1939, p. 352. But there the problem is the extent to which rulemaking powers should be given to and exercised by the Home Secretary. See *ibid.*; WILLIS, PARLIAMENTARY POWER OF ENGLISH GOVERNMENT DEPARTMENTS (1933) 27-29, 93; Comment (1917) 31 HARV. L. REV. 296.

56. See Defense (General) Regulations, 1939, S. R. & O. 1939, No. 927 (as amended) §§ 1A, 2C, 39A, 39B, 39BA (appearing in BURKE'S LOOSE-LEAF WAR LEGISLATION (1939) 558 *et seq.*; *ibid.* (1940) 629 *et seq.*, 730); Defense of Canada Regulations, 1939, Nos. 39, 39A, 62. The British regulations forbid conduct which the individual has "reasonable cause to believe likely" to have certain injurious results. The Canadian laws extend to acts "intended to or likely to cause" disaffection to his Majesty, etc. The elasticity of such definitions is apparent.

57. Alien Registration Act §§ 1-5, Pub. L. No. 670, 76th Cong., 3d Sess. (June 28, 1940). Cf. (1939) 53 HARV. L. REV. 149.

58. The insertion of "knowingly" in the statute appears intended to require proof of a criminal intent. Cf. SEN. REP. No. 944, 74th Cong., 2d Sess. (1936), part 4, appendix p. 72, § 10 (penal section of the army's proposed wartime draft plan of 1936).

59. Neither the original bill nor the version reported to the Senate contained "knowingly." See S. 4164, 76th Cong., 3d Sess. (1940) § 10 and SEN. REP. No. 2002, 76th Cong., 3d Sess. (1940). In the committee hearings, however, Senator Burke stated that the objectives of the penal section were not directed at any opposition that did not seek to urge disobedience of the law. See *Hearings before Senate Committee on Military Affairs*, 76th Cong., 3d Sess. (1940) 156. But the inefficacy of the term "willfully" in the Espionage Act to prevent doubtful convictions renders dubious the sufficiency of "knowingly" as a safeguard.

prompted by solicitude for the morale of the armed forces, have enacted moratory legislation for the protection of their citizens from suit while engaged in wartime military service.⁶⁰ Although morale would clearly have been enhanced by uniform treatment, it was not until 1918 that Congress made general provision for the preservation of the fighting man's economic position.⁶¹ The World War statute has served as a model for the present moratory legislation.⁶² The validity of the earlier law was sustained⁶³ as a war measure and its desirability during peace-time conscription seems beyond question.

Early moratory legislation in the United States generally took the rigid form of a suspension of remedies for some or all obligations of *all* men in the army.⁶⁴ But experience has demonstrated the wisdom of achieving greater flexibility by vesting discretion in the courts. Many conscripts can and should pay their obligations in full. A rigid moratorium may, moreover, impair the purchasing power of men by deterring merchants from extending credit to them and their dependents.⁶⁵ Therefore, both the 1918 Act and the present law, as well as their English counterpart,⁶⁶ have entrusted to the trial courts extensive discretion in according moratory protection to those in military service.⁶⁷

60. Feller, *Moratory Legislation: A Comparative Study* (1933) 46 HARV. L. REV. 1061, 1085.

61. Soldiers' and Sailors' Civil Relief Act, 40 STAT. 440 (1918). The federal act abrogated all laws inconsistent therewith. *Pierrard v. Hoch*, 97 Ore. 71, 191 Pac. 328 (1920); *Konkel v. State*, 168 Wis. 335, 170 N. W. 715 (1919). But *cf.* *Austby v. Yellowstone Valley Mortgage Co.*, 63 Mont. 444, 207 Pac. 631 (1922).

62. Soldiers' and Sailors' Civil Relief Act of 1940, Pub. L. No. 861, 76th Cong., 3d Sess. (Oct. 17, 1940).

63. *Clark v. Mechanics American National Bank*, 282 Fed. 589 (C. C. A. 8th, 1922). See *Ferry, Rosenbaum, and Wigmore, The Soldiers' and Sailors' Civil Rights Bill* (1918) 12 ILL. L. REV. 449, 472-75. For argument against its validity, see DUNHAM, *MORATORY LEGISLATION IN THE UNITED STATES* (1917) 12-19. Many state statutes have been held to violate the clause of the federal Constitution forbidding the states to impair the obligation of contracts. *Id.* at 9-12. But objections on this basis seem no longer tenable. See BLAIR, *BREACH OF CONTRACT DUE TO WAR* (1940) 68.

64. Feller, *Moratory Legislation: A Comparative Study* (1933) 46 HARV. L. REV. 1061, 1074; Comment (1920) 4 MINN. L. REV. 353, 354.

65. 55 CONG. REC. 7789 (1917).

66. Courts (Emergency Powers) Act, 1939, 2 and 3 GEO. VI, c. 67.

67. *Cf., e.g., Fennell v. Frisch's Adm'r*, 192 Ky. 535, 234 S. W. 198 (1921); *Gilluly v. Hawkins*, 108 Wash. 79, 182 Pac. 958 (1919).

Congress might well have clarified certain provisions of the 1918 act by indicating, for example, whether the mortgage moratorium includes periods of redemption. Compare *Ebert v. Poston*, 266 U. S. 548 (1925), with *Steinfeld v. Massachusetts Bonding & Ins. Co.*, 80 N. H. 39, 112 Atl. 800 (1921). And there is still some doubt whether secret interests of those in military service are protected. See (1918) 4 MASS. L. Q. 31. But *cf.* *Hoffman v. Charlestown Five Cents Savings Bank*, 231 Mass. 324, 121 N. E. 15 (1918) (oral trust protected).

While the Act protects the economic position of the conscript by suspending creditors' actions during his time of active service, it affords no solution to the problem of payment of accumulated obligations upon return to civil life, or to the difficulty of supporting his dependents in the interim.⁶⁸ In the last war, the United States, as well as the European nations, made provision for payment of allowances to the dependents of men in active service.⁶⁹ Extensive measures are in force in Europe for the maintenance of persons who were formerly supported by men in military service, and who have not sufficient resources in their absence.⁷⁰ While such legislation has been considered in the United States, Congress has postponed its enactment.⁷¹

Reemployment Provisions.—The most important of the draft law provisions designed to mitigate the economic hardships of the conscript is the guaranty that his job will be restored⁷² to him with reparation for any loss caused by the employer's unlawful refusal to rehire him on his return.⁷³

68. *The National Guard Resolution* (1940) 9 INT. JURID. ASS'N BULL. 25, 26; cf. Nichols, *Moratorium and Stay Laws* (1919) 4 VA. L. REG. (N.S.) 645, 646.

While it seems unlikely at present that men with dependents will be called, future exigencies may necessitate a change in this policy.

69. War Risk Insurance Act, 40 STAT. 398 (1917); GOVERNMENTAL PROVISIONS IN THE UNITED STATES AND FOREIGN COUNTRIES FOR MEMBERS OF THE MILITARY FORCES AND THEIR DEPENDENTS (Children's Bureau, U. S. Dep't Labor (1917) No. 11) 26.

The amount of allowances paid out during the last war amounted to \$265,986,936.52. [1920] REP. SEC'Y TREAS. ON THE STATE OF THE FINANCES (1921) 201. Individual families received from \$15 to \$30 depending on the circumstances of each case. See Lathrop, *Provision for the Care of Families and Dependents of Soldiers and Sailors* (1918) 7 ACAD. OF POL. SCI. PROC. 796, 799 *et seq.* Provision was made not only for wives and children but also for parents, grandchildren, brothers, and sisters. *Ibid.*

70. See *Allowances for Families of Mobilized Men* (1939) 40 INT. LAB. REV. 677.

71. 86 Cong. Rec., Sept. 30, 1940, at 19402. A Senate amendment providing for such aid disappeared in conference on the Excess Profits Tax Act of 1940.

Some business firms have decided to furnish financial aid to their drafted employees. (1940) 7 LAB. REL. REP. 73. Section 3(f) expressly permits this and a recent ruling of the Internal Revenue Bureau allows the deduction of salaries paid employees in national service as a regular expense. I. T. 3417, Oct. 14, 1940, 9 U. S. L. WEEK 2235.

72. Section 8(b). The provisions of this section are limited, however, to those persons who (1) obtain a certificate of satisfactory training and service, (2) are still qualified to perform the duties of the position, and (3) make application for reemployment within forty days after they are relieved from training and service. Section 8(c) buttresses the job guaranty with the mandate that the conscript shall not be discharged without cause within one year after restoration to his position.

73. Section 8(e). To enable the conscript to preserve these rights, this Section provides that the United States District Attorney or comparable officials for the district in which the employer maintains a place of business shall, if reasonably satisfied that the person applying is entitled to benefits, act as his attorney. The conscript is further encouraged to bring suit by provisions that no fees or court costs shall be taxed against him—apparently even when he loses or his suit is unreasonable. He may, however, sue only in the district court of the United States for the district in which the employer maintains a place of business.

While many European countries at the close of the World War compelled employers to reinstate demobilized workers in their former employment,⁷⁴ in the United States it was considered "impracticable to require reinstatement *in statu quo*."⁷⁵ And it is significant that even before the present hostilities, most European states took measures to ensure that civilians returning home from military duties would be restored to their former employment.⁷⁶ This provision seems well within the war power of Congress⁷⁷ and, in the light of foreign experience and in fairness to the conscript, is highly desirable.

The reemployment requirement will no doubt raise thorny problems but they will not all be unfamiliar. Decisions under the National Labor Relations Act which empowers the Labor Board to order reinstatement, with or without back pay, of employees who have been victims of unfair labor practices, will provide a convenient fund of experience from which the courts can receive guidance.⁷⁸ As in the NLRA, Congress has not explicitly provided for any relief for the employer.⁷⁹ The result may well be an anomalous situation: the employee entitled to all the rights of a continuing employment relation and the employer entitled to none.⁸⁰ This interpretation would negative the idea that the employment contract is merely suspended for a year,⁸¹ thus obviating the possibility of recovery by the employer against his

74. *E.g.*, the Belgian Law of Oct. 24, 1919, [1919] 2 PASINOMIE 129.

75. See Ferry, Rosenbaum, and Wigmore, *The Soldiers' and Sailors' Civil Rights Bill* (1918) 12 ILL. L. REV. 472-75. The authors helped draft this act.

The demobilization of the American armed forces led to a variety of state laws designed to provide employment for returning soldiers. See LABOR LEGISLATION OF 1919 (Bureau of Labor Statistics, Bull. 277, 1921) 26-28. The Federal Government, pursuing a policy similar to that provided by § 8(g) of the present conscription law, fostered a national organization for the purpose of aiding soldiers to obtain private employment. Litchfield, *United States Employment Service and Demobilization* (1919) 81 ANNALS 19. But little increase in unemployment resulted from demobilization. 3 LESCOHIER AND BRANDEIS, *HISTORY OF LABOR IN THE UNITED STATES, 1896-1932* (1935) 133.

76. See *Labour Problems in Time of War* (1939) 40 INT. LAB. REV. 589, 596.

77. See notes 2 and 3 *supra*; cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); see Keir, *Post-War Causes of Labor Unrest* (1919) 81 ANNALS 101, 103.

78. The original draft of the Conscription Act made the unlawful refusal to rehire conscripts an unfair labor practice within the meaning of the NLRA. SEN. REP. NO. 2002, 76th Cong., 3d Sess. (1940).

79. Of late, however, the NLRB has been hearing certain requests of employers. Rules and Regulations of the NLRB, Series 2, as amended and effective July 14, 1939, Art. III, § 1.

80. In France, the reinstatement guaranty was reciprocal as to contracts for a specified period. Decree of April 21, 1939, April 1939 Journal Officiel de la République Française 5234, art. 3.

81. The contrary conclusion might seem to follow from the provision guaranteeing to the conscript the same position that he held before he was called up. Section 8(b). Also the language of the Act that the conscript "shall be considered as having been on furlough or leave of absence during his period of training and service" protects rights whose acquisition normally depends on the continuity of the contract of employment. Section 8(c).

conscripted worker—not employed at will—for failure to return to his position.

The Labor Board's policy of requiring unlawfully discharged employees to make application for reinstatement with the employer before seeking the benefits of the Act⁸² is expressly embodied in the Selective Service Act. But the inflexibility of this statute may force the courts to demand proof of even a patently futile application, a result contrary to the Board's decisions.⁸³ In the ordinary case, the application requirement is a sensible provision, since it not only assures the employer that drafted employees who intend to seek reinstatement will return to work shortly after their release, but also furnishes a convenient point from which to compute damages if the employer wrongfully refuses to rehire.⁸⁴ Since right to reinstatement appears to be a prerequisite to compensation,⁸⁵ a conscript who obtains work elsewhere after denial of his applications might not, if he keeps his new position, be able to recover damages for the period of his unemployment. But a contrary result has been reached under substantially similar phraseology in the Wagner Act.⁸⁶ Since the draft law authorizes only the recovery of losses actually suffered, the court should take into account any sums the conscript may have earned since the refusal to rehire,⁸⁷ any incapacitation during the period,⁸⁸ and the seasonal nature of the employment.⁸⁹ While work-relief payments received by the conscript should operate to mitigate damages, the Supreme Court's recent decision under the Wagner Act⁹⁰ that an employer is not required to reimburse the public agency seems consonant with the draft law provisions.

82. Williams Coal Co., 11 N.L.R.B. 579 (1939).

83. E.g., Jacob A. Hunkele, 7 N.L.R.B. 1276 (1938).

84. That the draft law contemplates the use of the time of application and refusal may be inferred from the fact that generally the employer will have done no illegal act until refusal of the application. *Quaere*, which would govern if the refusal and application occurred on different dates. In the case of unfair labor practices, the Labor Board computes back pay from the time of the discrimination. 3 REP. NLRB (1939) 201.

85. Section 8(d)(c) provides: ". . . the district court . . . shall have power . . . to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person" (Italics supplied).

86. Mooresville Cotton Mills v. NLRB, 94 F. (2d) 61 (C. C. A. 4th, 1938); Jaden Mfg. Co., 19 N.L.R.B. No. 23, Jan. 8, 1940; see (1940) 49 YALE L. J. 956. *Contra*: NLRB v. Carlisle Lumber Co., 99 F. (2d) 533 (C. C. A. 9th, 1938), *cert. denied*, 306 U. S. 646 (1939).

87. Cf. 2 REP. NLRB (1938) 152. Recovery for any incidental benefits lost, however, is specifically authorized by § 8(e).

88. Cf. La Paree Undergarment Co., Inc., 17 N.L.R.B. No. 10, Nov. 2, 1939; Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. No. 71, Oct. 27, 1939.

89. Cf. NLRB v. Planters Mfg. Co., 106 F. (2d) 524 (C. C. A. 4th, 1939).

90. Republic Steel Corp. v. NLRB, 9 U. S. L. WEEK 4019 (U. S. Nov. 12, 1940). In numerous cases the Labor Board had held that work relief payments received by employees were to be deducted from back pay awards and repaid to the agency which provided the necessary funds. See (1939) 53 HARV. L. REV. 141.

For the protection of employers, the statute does not require reemployment where it is "impossible or unreasonable."⁹¹ Thus, for example, reinstatement would hardly be obligatory in the case of a necessary reduction in employment⁹² or discontinuance of the business.⁹³ Unionization subsequent to the employee's call to service might produce difficult problems if the union, having obtained a closed shop, either arbitrarily or with cause refused to admit him to membership. Where the conscript had been a strike-breaker, it would seem unreasonable to force the employer to endanger amicable relations with the union by rehiring him.⁹⁴ The success of the reinstatement provision will depend on the wisdom of the courts in the exercise of their discretion.⁹⁵ Since the escape clause may render the efficacy of the job-restoration guaranty somewhat doubtful in the eyes of the conscript, it seems unfortunate that the statute does not require the employer to enroll on a preferential list those conscripts who, while eligible for reemployment, have for just cause not been rehired.⁹⁶ And where a position of "like seniority, status, and pay" is unavailable, the employer might well have been required to offer employment, in the most favorable position practicable, to those whose training has terminated.⁹⁷

Conscription as a Means of Labor Control.—At an early point in the administration of the Selective Service Act of 1917, its possibilities for directing the movement of labor became apparent.⁹⁸ And the potentialities of the "Work or Fight" Regulation were appreciated, although the end of the war prevented their consummation.⁹⁹ The mainspring of this device is the granting

91. Section 8(b)(B).

92. Cf. *Union Drawn Steel Co. v. NLRB*, 109 F. (2d) 587 (C. C. A. 3d, 1940); *NLRB v. Bell Oil & Gas Co.*, 98 F. (2d) 405 (C. C. A. 5th, 1938).

93. Cf. *Phillips Granite Co.*, 11 N.L.R.B. 910 (1939); *Shell Petroleum Co.*, 10 N.L.R.B. 719 (1938).

94. Cf. *Acerno v. North Shore Bus Co.*, 173 Misc. 79, 17 N. Y. S. (2d) 170 (Sup. Ct. 1939). Like considerations would apply to changes in seniority rights growing out of agreements with the union.

95. Vesting discretion in the courts seems preferable to a restrictive enumeration of the reasons which may be validly advanced by the employer in refusing reinstatement, such as is provided in Decree of April 21, 1939, April 1939 *Journal Officiel de la République Française* 5234, art. 2.

96. Cf. *F. R. Barrett*, 3 N.L.R.B. 513 (1937); *Smith Wood Products, Inc.*, 7 N.L.R.B. 950 (1938).

97. Cf. *National Service (Armed Forces) Act*, 1939, 2 and 3 GEO. VI, c. 81, § 14(1)(b); Law of Oct. 24, 1919, [1919] 2 *PASINOMIE* 129 (Belgian law requiring that in case of temporary impossibility of reinstatement the employer notify the worker as soon as reinstatement becomes possible).

98. See 1 REP. PROVOST-MARSHAL-GEN. (1918) 33.

99. SELECTIVE SERVICE REGULATIONS (2d ed. 1918) § 121 A-L. See 2 REP. PROVOST-MARSHAL-GEN. (1919) 4, 10, 12-18, 75-85; Hoague, Brown, and Marcus, *Wartime Conscription and Control of Labor* (1940) 54 HARV. L. REV. 50, 58-59. The substance of this Regulation was to authorize the local boards to investigate idlers and those engaged in non-productive occupations and under certain conditions to withdraw their

or maintenance of deferments only so long as a man is engaged and works acceptably in industries or even plants which the government classifies as contributing to the national effort.¹⁰⁰

Since the government, in conscripting an army for modern war, may plausibly assert that an individual not devoting his full time to an essential occupation is a more appropriate subject for military service than one who is, the constitutionality of this measure is not directly open to attack.¹⁰¹ The Regulation under the 1917 Act was not challenged, and a similar regulation could be made under the present law.¹⁰² The "Work or Fight" principle, reinforced by the use of furloughs for men already drafted¹⁰³ and the denial of essential supplies to non-productive industries and of consumers goods to recalcitrant individuals, offers possibilities of labor control as complete as a direct labor draft¹⁰⁴—and perhaps more effective. Real power to strike would not exist¹⁰⁵ and men would virtually be compelled to work at the position and under the conditions assigned to them. The detailed operation of such a policy is beyond the scope of this discussion.¹⁰⁶ In 1936, the Senate Committee on the Munitions Industry strongly disapproved,¹⁰⁷ and subse-

deferred classification or to lower their order numbers. Definition of non-productive occupations did not go beyond individuals engaged primarily in personal service—*i.e.*, waiters, sales clerks, bellhops, etc.

100. See note 99 *supra*.

101. See Hoague, Brown, and Marcus, *Wartime Conscription and Control of Labor* (1940) 54 HARV. L. REV. 50, 87.

102. Section 5(e) vests in the President a broad discretion through the issuance of such rules as he shall prescribe over all deferments. Section 5(h) provides that no exemptions or deferments shall continue "after the cause therefor has ceased to exist." Section 353 of the Regulations limits occupational deferments to six months, renewable unless the board finds reclassification proper. In England postponement certificates for domestic positions, business responsibilities, or extreme hardship are limited to six- or twelve-month periods, and are subject to cancellation by the Minister of Labour and National Service at any time. National Service (Armed Forces) Act, 1939, 2 and 3 GEO. VI, c. 81, § 8.

103. The Industrial Furlough Act, 40 STAT. 450 (1918) authorized furloughing of soldiers for industrial or agricultural work, but was limited to those voluntarily applying. However, express statutory authority for such a policy may not be needed. See 2 REP. PROVOST-MARSHAL-GEN. (1919) 16.

104. See SEN. REP. No. 944, Part 4, 74th Cong., 2d Sess. (1936) 48, 49.

105. President Wilson threatened to withdraw the deferments of certain employees who had refused to accept an award of the National War Labor Board. U. S. Dep't of Labor, Bureau of Labor Statistics No. 287 (1920) 36. Other devices are the withholding of supplies through a priority system and the use of drafted men as strikebreakers. See SEN. REP. No. 944, Part 4, 74th Cong., 2d Sess. (1936) 49, 52. At present, although actual violation of the law might be avoided, the use of draftees as strikebreakers would conflict with the policy expressed in the Byrnes Act, which forbids interstate transportation of strikebreakers. 49 STAT. 1899 (1936), as amended, 52 STAT. 1242 (1938), 18 U. S. C. § 407(a) (Supp. 1939).

106. See Hoague, Brown, and Marcus, *Wartime Conscription and Control of Labor* (1940) 54 HARV. L. REV. 50.

107. SEN. REP. No. 944, Part 4, 74th Cong., 2d Sess. (1936) 4.